

ITEM 5.1:**PRE-ACTION PROTOCOLS – RESEARCH AND NEXT STEPS****Purpose**

1. To inform the Committee of discussion at the Scottish Civil Justice Council (SCJC) meeting of 13 January 2014 in relation to the Committee's intention to prepare a proposal for the commissioning of research into pre-action protocols.
2. To seek members' views on proposals for an information gathering exercise to be carried out under the auspices of the Committee.

Discussion

3. At its meeting of 9 December 2013 the Committee agreed the following:

"23. Following discussion, the Committee indicated that they wished to propose that the SCJC would use its powers to approve research into the use of the Law Society's voluntary pre-action protocols in Scotland.

24. Members agreed to feed any thoughts on how this research should be conducted and what it should encompass back to the SCJC Secretariat."

4. The Committee's proposal was considered by the SCJC at its meeting of 13 January 2014. The SCJC was of the view that, given the limited budget for research, rather than commissioning research, the Committee should carry out an information and evidence gathering exercise through its own membership. It was thought that the exercise should take account of the role of party litigants, whether a new pre-action protocol regime to be introduced in advance of the creation of the specialist Personal Injury Court and whether there are variations in awards of expenses where the pre-action protocol has not been adhered to.
5. In light of the SCJC's consideration of the matter, it is suggested that the Secretariat support the Committee in carrying out such an exercise. While it will be necessary to prepare more detailed proposals in this regard, we provide some initial suggestions as to what form such an exercise might take, which organisations might be consulted and what themes. If the Committee is content to proceed on this basis, members' views are sought on the proposed approach..

General approach

6. It is suggested that a targeted written information gathering exercise be conducted, rather than a public consultation, with views and evidence sought on specific topics. The Secretariat would collate and analyse the information gathered for consideration by the Committee at a future meeting.

What information should be sought?

7. Members may wish to consider asking questions around the following (suggestions already received from members on the matter have been developed and added to):
 - Whether the stated aims and purposes of the current Voluntary Pre-Action Protocols are adequate to comply with the recommendations of the Scottish Civil Courts Review.
 - What changes, if any, should be made to the Voluntary Pre-Action Protocols to make them more effective in achieving their stated aims and purposes. Are any changes required to ensure the Protocols reflect the needs of party litigants.
 - Whether a compulsory protocol should apply to higher value cases involving fatal or catastrophic injury. If not, what the “cut off” threshold should be? If so, what changes, if any, should be made to the current voluntary protocols to facilitate use in higher value personal injury claims or those involving catastrophic injury.
 - The success or otherwise of separate pre-action protocols for professional negligence and industrial disease claims.
 - Whether it is necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma.
 - Should a pre-action protocol for medical negligence claims be developed. If so, what should the key features be. Are there any issues relating to the operation of the Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account.
 - Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court?

- Are there variations in awards of expenses where the pre-action protocol has not been adhered to.
8. Members are invited to consider if there are any other areas they wish the research to cover. It has been suggested to us that there may be merit in considering the position in England and Wales in relation to particular
 9. It is submitted that members themselves have a wide range of knowledge from which they can draw and as such may wish to submit their own views on the topics listed above. In addition, it may be helpful to approach following organisations:
 - Faculty of Advocates
 - Law Society of Scotland's Voluntary Pre-Action Protocol Working Group
 - Association of Personal Injury Lawyers in Scotland
 - Forum of Insurance Lawyers
 - Forum of Scottish Claims Managers
 - Association of British Insurers
 - Citizens Advice Scotland
 - Which?
 10. Members' views would be welcome as to whether any further organisations or individual firms should be consulted.

Timescales

11. It is suggested that a report could be prepared for the Committee's consideration by July 2014. That would allow up to 12 weeks for responses and around 4-6 weeks for analysis (this will be dependent on the content of responses received).

Recommendation

12. **That members agree to an information exercise being carried out under the auspices of the Committee, and give views on the approach outlined**

at paras. 6-11 of this paper. Subject to agreement, detailed proposals and a questionnaire incorporating members' views will be prepared for the Chair's consideration following the meeting.

SCJC Secretariat – January 2014